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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

SAN JOSE DIVISION

| | | |
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| J.L. <i>et al.</i> , on behalf of themselves and all others similarly situated, |) | CASE NO. 5:18-CV-4914 NC (DMR) |
| |) | |
| |) | DEFENDANTS' NOTICE OF MOTION |
| Plaintiffs, |) | AND MOTION FOR |
| |) | RECONSIDERATION RE: ECF NO. 252 |
| v. |) | |
| |) | Hearing Date: March 25, 2020 |
| KENNETH T. CUCCINELLI, II, Principal |) | Time: 1:00 pm |
| Deputy Director and Senior Official |) | |
| Performing the Duties of Director, United |) | Hon. Nathanael M. Cousins |
| States Citizenship and Immigration Services, |) | |
| CHAD F. WOLF, Acting Secretary, |) | |
| Department of Homeland Security, <i>et al.</i> , |) | |
| |) | |
| Defendants. |) | |

NOTICE OF MOTION

PLEASE TAKE NOTICE that on March 25, 2020 at 1:00 pm, pursuant to the Court's
minute order, on March 5, 2020 (ECF No. 263), granting leave to file a motion for

1 reconsideration, Defendants Kenneth T. Cuccinelli, II, Principal Deputy Director and Senior
2 Official Performing the Duties of Director of the United States Citizenship and Immigration
3 Services (“USCIS”), Robert Cowan, Director of the National Benefits Center, Chad F. Wolf,
4 Acting Secretary of the Department of Homeland Security (“DHS”), as well as USCIS and DHS
5 (collectively “Defendants”) hereby move the Court for a Motion for Reconsideration, under Civil
6 L.R. 7-9, to modify the Court’s Amended Contempt Order (ECF No. 252).

7 Defendants principally seek to be relieved of the coercive sanction because, despite
8 reasonable efforts to purge the contempt, factors outside their control prevented them from
9 complying with Court’s February 29, 2020 deadline to return the individuals to the United States.
10 Alternatively, Defendants seek to toll the effective date of the coercive sanctions to take into
11 account delays that were not attributable to Defendants. This Motion for Reconsideration is
12 supported by the Memorandum of Points and Authorities attached hereto, all pleadings, papers,
13 and files in this action, and such oral argument as may be presented on the Motion. A proposed
14 order is also attached.

15 Respectfully submitted,

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Dated: March 13, 2020

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1 **MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION**

2 On February 14, 2020, the Court held Defendants in civil contempt after determining that
3 they had violated the October 24, 2018 preliminary injunction (“PI”) by removing N.P.G., E.A.,
4 R.M.N., E.S.L.D.A., and M.W.D.C. without providing 14 days’ notice to Class Counsel. ECF
5 No. 249; *see also* ECF No. 252 (amending ECF No. 249) (“Contempt Order”). The Court
6 ordered that “Defendants must facilitate N.P.G., E.A., R.M.N., E.S.L.D.A., and M.W.D.C.’s
7 return to the United States to the extent they wish to be returned by February 29, 2020.” ECF No.
8 252 at 6, ¶ 1. Further, it ordered “[f]or each day after February 29, 2020, that N.P.G., E.A.,
9 R.M.N., E.S.L.D.A., and M.W.D.C. has not been returned to the United States, Defendants must
10 pay Plaintiffs’ counsel \$500 per removed class member that wishes to be returned to the United
11 States.” *Id.* at 7, ¶ 7.

12 On February 28, 2020, Defendants filed a Notice of Inability to Comply, informing the
13 Court they were unable to return E.A., R.M.N., E.S.L.D.A., and M.W.D.C., by the Court’s
14 February 29, 2020 deadline¹ due to reasons outside of Defendants’ control and requested relief
15 from the coercive sanctions. *See* ECF No. 257. The Court held a hearing on March 5, 2020, and
16 heard from the parties, including Plaintiffs’ position regarding Defendants’ request for relief.
17 Defendants informed the Court that ICE returned N.P.G. on February 12, 2020, E.S.L.D.A. on
18 March 2, 2020, and M.W.D.C. on March 5, 2020. Defendants stated that they further hoped to
19 return R.M.N. on March 12, but whether they would be able to do so depended on whether he
20 had a valid passport and whether he was physically able to travel. The Court granted Defendants
21 leave to file a motion for reconsideration to raise the points made in their Notice of Inability to
22 Comply. *See* ECF. No. 263.

23
24
25
26 _____
27 ¹ Defendants returned N.P.G. to the United States, on February 12, 2020, before the Court’s
28 deadline.

1 **SCOPE AND STANDARD OF REVIEW**

2 The Northern District Civil Local Rules state that a party may, with leave of the Court,
3 file a motion for reconsideration of any interlocutory order. Civil L.R. 7-9 (a). The moving party
4 must show (1) “[t]hat at the time of the motion for leave, a material difference in fact or law
5 exists,” about which the party applying for reconsideration did not know at the time of the order,
6 and which warrants reconsideration; (2) “[t]he emergence of new material facts or a change of
7 law occurring after the time of such order; or (3) [a] manifest failure by the Court to consider
8 material facts or dispositive legal arguments.” Civil L.R. 7-9 (b).

9 **ARGUMENT**

10 **I. THE COURT SHOULD MODIFY THE CONTEMPT ORDER BECAUSE THE**
11 **PER DIEM COERCIVE SANCTIONS ARE PUNITIVE WHERE DEFENDANTS**
12 **LACKED THE ABILITY TO COMPLY WITH THE COURT’S CONTEMPT**
13 **ORDER FOR REASONS BEYOND THEIR CONTROL.**

14 Defendants request that the Court relieve them of the \$500 per diem coercive sanctions
15 for not returning four individuals to the United States by February 29, 2020, because, despite
16 their best efforts, Defendants were unable to comply by that Court imposed deadline due to
17 circumstances beyond Defendants’ control. Even prior to the Contempt Order, Defendants
18 already had voluntarily agreed to return the individuals and were actively working to do so.
19 Further, Defendants were unable to meet the February 29th deadline due to delays on the part of
20 the individuals themselves and, thus, Defendants’ “ability to remedy the injury [was not] largely
21 in Defendants’ hands” (ECF. No. 249 at 7). Thus, the per diem coercive sanctions serve only to
22 punish Defendants, rather than incentivize or motivate compliance with the Contempt Order.

23 The \$500 per diem coercive sanction is punitive, rather than coercive or compensatory,
24 because Defendants were unable to return four of the five individuals by the Court’s deadline for
25 reasons beyond their control. *Cf. Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770,
26 781 (9th Cir. 1983) (“every precaution should be taken that [civil contempt] orders issue ... only
27 after legal grounds are shown and only when it appears that obedience is within the power of the
28 party being coerced by the order”) (internal citations omitted). Importantly, however, to date,

1 Defendants have successfully returned three of the individuals (N.P.G., E.S.L.D.A., and
2 M.W.D.C.), are in the process of returning R.M.N. They have also made extensive efforts to
3 contact E.A. to determine whether he wants to return — and recently learned from E.A.’s family
4 friend that E.A. does not wish to return to the United States. Thus, Defendants respectfully
5 request the Court relieve them of the per diem coercive sanctions because they have and continue
6 to have a punitive, rather than a coercive effect.

7 It is well established that “[a] contempt fine ... is considered civil and remedial if it either
8 coerces the defendant into compliance with the court’s order, or compensates the complainant for
9 losses sustained. Where a fine is not compensatory, *it is civil only if the contemnor is afforded an*
10 *opportunity to purge.*” *Int’l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 829 (1994)
11 (emphasis added). Accordingly, while “[o]ne of the paradigmatic civil contempt sanctions is a
12 per diem fine imposed for each day a contemnor fails to comply with an affirmative court
13 order[,]” *United States v. Ayres*, 166 F.3d 991, 995 (9th Cir. 1999), such sanctions “are only
14 appropriate where the contemnor is able to purge the contempt by his *own* affirmative act and
15 ‘carries the keys of his prison in his own pocket.’” *Id.* at 996–97 (citing *Bagwell*, 512 U.S. at
16 828) (emphasis added). In other words, a court’s power to impose coercive civil contempt
17 depends upon the ability of the contemnor to comply with the court’s coercive order. *Falstaff*,
18 702 F.2d at 778 (citing *Shillitani v. United States*, 384 U.S. 364, 371 (1966) and *Maggio v. Zeitz*,
19 333 U.S. 56, 76 (1948)).

20 The Ninth Circuit Court of Appeals has found contemnors’ inability to purge contempt
21 by their own affirmative acts rendered civil contempt to be *criminal* because the coercive
22 sanctions became *punitive*. *See Ayres*, 166 F.3d at 996–97 (“A contemnor’s ability to purge civil
23 contempt ... cannot be contingent upon the acquiescence of an opposing party because such an
24 arrangement effectively renders the contempt punitive, rather than civil.”); *Falstaff*, 702 F.2d at
25 772, 780 (holding that the civil contempt order was invalid because the record showed that
26 compliance with the court’s order to return the missing documents was impossible).

1 In *Ayres*, the district court had entered a civil contempt order against the contemnor, a
2 target of an Internal Revenue Service (“IRS”) investigation, because of the contemnor’s refusal
3 to comply with a summons enforcement order to appear before the IRS. *Ayres*, 166 F.3d at 994.
4 The district court ordered the contemnor to comply with the summons enforcement order within
5 a 10-day grace period or face a \$500 fine for each day that he failed to comply thereafter. *Id.*
6 When the contemnor attempted to schedule an appearance before the IRS within the requisite
7 time period in order to comply with the contempt order, the IRS stated that relevant officers were
8 unavailable on short notice and scheduled the contemnor’s appearance for a later date outside the
9 grace period. *Id.* Consequently, the contemnor was unable to comply with the contempt order
10 until four days after the expiration of the grace period, thus incurring \$1,500 in fines. *Id.*

11 On appeal, the Ninth Circuit held that the district court erred in imposing the coercive
12 \$500 per day sanction because the contemnor had attempted to comply with the contempt order
13 within the 10-day grace period but was unable to do so because of reasons beyond his control,
14 namely, “the IRS’s asserted scheduling problems” (*id.*):

15 By ignoring the IRS’s intransigence and by imposing sanctions despite [the
16 contemnor’s] inability to purge the contempt by his *own* affirmative act, the
17 district court effectively imposed punitive, rather than coercive, contempt
18 sanctions without following the heightened procedural requirements for such
19 sanctions. Put most simply, the district court abused its discretion because it fined
20 [the contemnor] for the IRS’s delay. We therefore reverse the order assessing the
21 \$1,500 fine.

22 *Id.* at 996–97 (internal citations omitted) (emphasis added).

23 Similarly, in *Falstaff*, the district court ordered the contemnor to return missing
24 documents, imposing a non-refundable fine if the documents were not returned within ninety
25 days. *Falstaff*, 702 F.2d at 777. A previous investigation of the lost files, however, had
26 determined that after a “thorough search[,]” “further efforts to search for the missing documents
27 would be *futile*” and that it was “*impossible* to ascertain their present whereabouts.” *Id.* at 775
28 (emphasis in original). On appeal, the Ninth Circuit found that “the [contempt] cannot be
construed as coercive civil contempt because the uncontradicted evidence before the court ...

1 established that, despite an exhaustive search, it was ‘impossible’ and ‘futile’ to find the missing
2 documents.” *Id.* at 780. The Ninth Circuit panel emphasized that “[c]onditioning an order of
3 contempt on the performance of an impossible act, for the purpose of punishing a contemnor for
4 its incapacity to perform the act, does not square with the Supreme Court’s admonishment that
5 ‘[e]very precaution should be taken that orders issue ..., only after legal grounds are shown and
6 only when it appears that obedience is within the power of the party being coerced by the
7 order.’” *Id.*, 702 F.2d at 781 (citing *Maggio*, 333 U.S. at 72–73, n.6) (alterations in original).
8 Thus, the Court held “it was impossible for [the contemnor] to purge itself of contempt...”
9 *Falstaff*, 702 F.2d at 782.

10 Here, facilitating the return of removed individuals is highly involved, complex and
11 delicate process involving foreign governments and a number of U.S. agencies. The United
12 States Immigration and Customs Enforcement (“ICE”) is at the center of this complicated
13 interagency process. *See* ECF No. 257-1, ¶¶ 6–7. The facilitation of an individual’s return to the
14 United States, and the time required to facilitate the return, turns on many factors, particularly,
15 whether the individual has a passport, whether he can be reliably contacted and located, and
16 whether the individual cooperates with the travel coordination efforts. *See id.*, ¶¶ 5, 7. Another
17 key factor is whether the individual is working with an attorney. The individual’s attorney often
18 plays a critical role in facilitating an individual’s return. Not only does the attorney likely have
19 more accurate contact and location information, he can serve as a liaison and point of contact
20 between ICE and the individual. *See id.*, ¶ 7.

21 For almost all of the five individuals here, ICE has encountered challenges affecting its
22 ability to facilitate their returns, such as locating and contacting the individual or his attorney.
23 *See id.* Indeed, ICE returned N.P.G. to the United States before the Court entered its Contempt
24 Order because ICE was able to establish and maintain reliable contact with him since November
25 27, 2019. *See* ECF No. 226-1, ¶ 16; *see generally* ECF No. 238-4; ECF No. 256-1.

26 Moreover, the five individuals in this case are located in either Guatemala or Mexico,
27

1 which both have their own travel-document requirements that ICE must comply with. *See* ECF
2 No. 257-1, ¶¶ 8–9. By setting February 29 as the deadline for Defendants to purge the contempt,
3 the Court essentially turned the sanction’s conditional nature into a virtual certainty. While the
4 civil contemnor is said to “carr[y] the keys of his prison in his own pocket,” *Int’l Union, United*
5 *Mine Workers v. Bagwell*, 512 U.S. 821, 828 (1994), here, as explained for each individual
6 below, others “carr[y] the keys” in many crucial respects. Thus, the Contempt Order’s
7 requirement that Defendants pay \$500 per day for each removed individual does not have its
8 intended coercive effect, but instead is mostly punitive.² *See Kelly v. Wengler*, 822 F.3d 1085,
9 1097 (9th Cir. 2016) (“A criminal sanction ... generally seeks to punish a completed act of
10 disobedience.”) (Internal citations and quotation marks omitted); *S.E.C. v. Elmas Trading Corp.*,
11 824 F.2d 732, 732 (9th Cir. 1987) (“Regardless of the purpose of the order, if ... [the contemnor]
12 lacks the ability to comply with it, or it has lost all coercive effect, the contempt becomes
13 criminal ...”).

14 Thus, Defendants request the Court to relieve them of the coercive per diem sanction
15 because “[a]bility to comply is a crucial inquiry for the court’s decision concerning coercive civil
16 contempt orders, and ‘a court should weigh all the evidence properly before it determines
17 whether or not there is actually a present ability to obey and whether failure to do so constitutes
18 deliberate defiance or willful disobedience which a coercive sanction will break.’” *Falstaff*, 702
19 F.2d at 781 n. 6.

22 ² Contrary to Plaintiffs’ arguments at the hearing, Defendants do not dispute that the Court has
23 the authority to impose “a per diem fine ... for each day [Defendants] fail[] to comply with an
24 affirmative court order.” *Bagwell*, 512 U.S. at 828. Moreover, Defendants do not challenge that
25 “[a] daily fine of \$500.00 is ... within the range of coercive per diem fines issued by courts in
26 this district for civil contempt.” *Arabian Gas & Oil Dev. Co. v. Wisdom Marines Lines, S.A.*, No.
27 16-CV-03801-DMR, 2017 WL 4390184, at *7 (N.D. Cal. Oct. 3, 2017) (collecting cases).
Rather, Defendants contend that they attempted — but were unable to — purge the contempt by
returning the removed individuals by February 29, 2020, for reasons beyond their control, and,
therefore request appropriate relief to allow Defendants to return the removed individuals
without incurring the coercive per diem sanction.

1 Alternatively, Defendants request the Court to stay the coercive per diem sanction until
2 “the ability to remedy the injury is largely in Defendants’ hands” (ECF No. 252), or to toll the
3 effective date of the coercive sanction to take into account delays that were outside of
4 Defendants’ control based on an individualized determination, or to grant a reasonable extension
5 to return the remaining removed individuals.

6 **A. E.A.**

7 First and foremost, Defendants recently learned that E.A. does not wish to return to the
8 United States. Ex. 1, ¶ 9. Previously, in December 2019, Ms. Behr, E.A.’s attorney, indicated
9 that he wished to return to the United States, but that he “might back out”. ECF No. 256-4, ¶ 5.
10 At that time, ICE made exhaustive efforts to speak to E.A., but was unable to contact him and
11 ascertain if he desired to return to the United States and, thus, could not begin the facilitation
12 process. Moreover, as detailed below, his attorney, Ms. Behr, stated that she would not provide
13 E.A.’s contact information to ICE and would not offer any further assistance because she also
14 has lost contact with E.A. Further, even Class Counsel has been unable to provide information
15 regarding E.A.’s whereabouts,³ and at the March 5 hearing, Plaintiffs excluded E.A. from their
16 Plaintiffs’ discussion of the remaining aliens that still needed to be returned. See ECF No. 262 at
17 4:24-4:36. Defendants, despite substantial efforts, have been unable to purge the contempt by
18 their own affirmative acts. *See Ayres*, 166 F.3d at 995 (citing *Bagwell*, 512 U.S. at 828); *Falstaff*,
19 702 F.2d at 782.

20 This week, ICE Enforcement and Removal Operations (“ERO”) finally learned, via
21 communication with a family friend, that, according to E.A.’s mother, E.A. does not wish to
22 return to the United States. *See* Ex. 1, ¶ 9.

23 Thus, at a minimum, this Court should not impose any coercive sanction for E.A. because
24 Defendants, despite substantial efforts, have been unable to purge the contempt by their own
25

26 ³ Defendants requested Class Counsel’s assistance in locating E.A. Specifically, Defendants
27 sought Class Counsel’s assistance in letters dated February 7, and February 18, 2020. Although
28 Class counsel has expressed willingness to assist, they have not provided any information.

1 affirmative acts. And coercive sanctions for E.A. are further inappropriate because the lack of
2 assistance or cooperation from E.A.'s attorney further frustrated ERO's efforts to facilitate his
3 return. As *Ayres* makes clear, Defendants' "ability to purge civil contempt ... cannot be
4 contingent upon the acquiescence of" Ms. Behr. *See Ayres*, 166 F.3d at 997. E.A.'s attorney has
5 not provided assistance to ICE, despite its extensive efforts to seek her help. Although ERO has
6 been in contact with Ms. Behr since December 2019, communication with her has been
7 unreliable due to her being largely non-responsive to ERO's phone calls and messages.⁴ ECF
8 No. 256-4, ¶¶ 4, 9, 10, 11.

9 Additionally, ERO continued to seek out E.A. independently. ERO reviewed E.A.'s alien
10 file and found contact information for a family friend, Ana, as well as his previous attorney
11 (Wendy Ramirez), and previous bond obligor (Yolanda). ECF No. 256-4, ¶ 14. On February 19,
12 2020, ERO contacted Ana, who said that she would contact E.A.'s parents to see if he wished to
13 return to the United States. *Id.*, ¶ 15. On February 21, 2020, Ana told ERO that she had not heard
14 back from E.A.'s parents. *Id.*, ¶ 16. On February 27, 2020, ERO tried calling Ana and Wendy, in
15 an attempt to procure contact information for E.A. *Id.*, ¶ 18. But both calls went to voicemail,
16 and, although ERO left voice messages. *Id.*, ¶ 19. Finally, on March 12, 2020, ERO reached Ana,
17 who explained that E.A.'s mother told her that he did not wish to return to the United States. Ex.
18 1, ¶ 7. Although Ana stated she provided E.A.'s mother with ERO's contact information, neither
19 E.A. nor his mother ever directly contacted ERO. *Id.*, ¶ 8. With this new development, it is even
20 more evident that Defendants should not incur any coercive sanctions for its inability to return
21

22 ⁴ On January 29, 2020, ERO made multiple attempts to contact Ms. Behr by phone and email,
23 but was unsuccessful. *Id.*, ¶ 9. Moreover, Ms. Behr did not respond to any of ERO's messages.
24 *Id.* On February 3, 2020, ERO emailed Ms. Behr, and she indicated that she had not had any
25 further contact with E.A. *Id.*, ¶ 10. On February 7, 2020, ERO called Ms. Behr to request an
26 update on E.A.'s desire to return to the U.S., but she did not answer the phone. *Id.*, ¶ 11. On
27 February 7, 2020, ERO requested Ms. Behr to provide E.A.'s contact information in Mexico so
28 that ERO could try to communicate with him directly. *Id.*, ¶ 12. Ms. Behr did not respond until
February 11, 2020, when she stated that she was no longer in contact with E.A. and that she
could not release his contact information to ERO without E.A.'s consent to do so. *Id.*, ¶ 13.

1 E.A. because the sanction ¶ 7 applies only to “class member[s] [who] wish[] to be returned to the
2 United States.” ECF No. 252, ¶ 7.

3 Thus, based on the circumstances — especially given that E.A. does not seem to want to
4 return to the United States — any coercive sanctions regarding E.A. are not appropriate. *United*
5 *States v. Hernandez*, No. 17-CV-00040-BLF, 2018 WL 1684336, at *2 (N.D. Cal. Apr. 5, 2018)
6 (“[C]oercive imprisonment must eventually end, even if the respondent does not comply.
7 Coercive confinement must end once the court determines confinement achieved any possible
8 coercive effect and additional confinement would be punitive.”) (internal citations omitted). In
9 sum, this Court should modify the contempt order to exclude E.A. and more importantly, to
10 waive any coercive sanctions against Defendants with respect to E.A. entirely.⁵

11 **B. R.M.N.**

12 Because factors outside Defendants’ control rendered them unable to facilitate R.M.N.’s
13 return by February 29, 2020, the Court should suspend and or toll the per diem coercive sanction
14 as applied to R.M.N. Despite extensive efforts to do so, neither ERO nor R.M.N.’s attorney were
15 able to establish reliable contact with R.M.N. until recently. ERO has been in contact with
16 Mr. Imbriano, R.M.N.’s attorney, since January. ECF No. 256-2, ¶ 3. Despite this, neither ERO
17 nor Mr. Imbriano made any reliable contact with R.M.N. until recently. *See id.*, ¶ 7. On February
18 13, 2020, the day before the Contempt Order, ERO was working with Mr. Imbriano to find
19 alternative means to reach R.M.N. because his phone appeared to be disconnected. *Id.*, ¶ 5.
20 Finally, on February 20, 2020, ERO and Mr. Imbriano, established reliable contact with R.M.N.,
21 and ERO was able to proceed with the facilitation process. *See id.*, ¶ 7. ERO made flight
22 arrangements to transport R.M.N. back to the United States on February 27, 2020, in time for the
23

24 ⁵ Although ICE nonetheless remains willing to facilitate E.A.’s return, should he wish to return,
25 Defendants request that he communicates his intent to ICE by May 15, 2020, one month before
26 Defendants must adjudicate all SIJ petitions under the settlement agreement. Defendants note
27 that, if ICE does not hear from E.A. by May 15, 2020, then USCIS will adjudicate E.A.’s Special
Immigration Juvenile (“SIJ”) petition, regardless of his presence in the United States, on or
before the final date for adjudicating all of the SIJ petitions under the Settlement Agreement.

1 Court's deadline. *See id.*, ¶ 10. But on February 25, 2020, R.M.N.'s attorney told ERO that
2 R.M.N. had an injury, which he did not elaborate on, that rendered R.M.N. unable to travel until
3 the following week. *See id.* R.M.N.'s injury further delayed his ability to travel to Guatemala
4 City to obtain his passport, which Guatemala requires for departure. *Id.*, ¶ 8.

5 ERO and Mr. Imbriano are working together to coordinate R.M.N.'s travel plans to
6 depart Guatemala to the United States. ERO had planned for R.M.N.'s return on March 12, 2020,
7 provided that R.M.N. had obtained a valid passport as required by the Guatemalan government
8 in order for him to depart the country. *Id.*, ¶¶ 8, 11. But since R.M.N. had not provided a valid
9 passport by March 12th, R.M.N. was unable to leave the country that day Guatemala will not
10 permit R.M.N. to depart Guatemala without a passport. *See Ex 2*, ¶ 3.

11 Mr. Imbriano recently obtained and mailed R.M.N.'s passport to the ICE Attaché to
12 enable R.M.N. to depart Guatemala. *Ex. 2*, ¶ 4. On March 13, 2020, Mr. Imbriano stated that the
13 tracking number for the passport indicated that it was delivered to a military base in Guatemala
14 on March 9, 2020. *Id.*, ¶ 5. Although, the ICE Attaché's office has not received the passport to
15 date, it is working on retrieving it. *See id.*, ¶ 5.

16 Thus, ERO intends to schedule a flight for R.M.N. to return the following week, on
17 March 19, 2020, assuming the ICE Attaché receives R.M.N.'s passport and verifies that it is
18 valid. *See id.*, ¶¶ 4, 7. Given the circumstances, Defendants should not be liable for the per diem
19 coercive sanctions accruing since March 1, 2020 because reasons beyond ERO's control caused
20 the delay in R.M.N.'s return, including R.M.N.'s physical inability to travel and R.M.N.'s and
21 his attorney's delay in sending R.M.N.'s passport to ERO. Similar to the contemnor's posture in
22 *Ayres*, Defendants should not be fined for failing to timely purge the sanctions due to the R.M.N.
23 and his counsel's delay. *See Ayres*, 166 F.3d at 996–97. Thus, this Court should grant relief
24 regarding the coercive sanctions attached to Defendants' inability to facilitate R.M.N.'s return by
25 February 29, 2020, or else it would render the sanction punitive, since much of the delay is not
26 attributable to Defendants. *See Ayres*, 166 F.3d at 996–97.

1 Therefore, Defendants, request the Court suspend or the per diem coercive sanctions, or
2 toll the time until ICE receives R.M.N.'s passport, R.M.N. confirms that he is physically able
3 and willing to travel, and ICE has a reasonable period of time to schedule R.M.N. on the next
4 available flight from Guatemala to the United States. Defendants request that the per diem
5 coercive sanctions only restart if further delay, if any, is solely attributed to Defendants.

6 **C. M.W.D.C.**

7 ICE returned M.W.D.C. to the United States on March 5, 2020. Ex. 3, ¶ 5. Although his
8 return occurred after the Court's February 29 deadline, the Court should relieve Defendants of
9 the per diem coercive sanctions for that four-day delay because Defendants were unable to
10 facilitate his return for reasons beyond their control. In other words, Defendants were unable to
11 purge the contempt with their own acts before the coercive sanctions started to accrue.

12 ERO first contacted M.W.D.C.'s attorney, Mr. Mikrut, on January 17, 2020. ECF No.
13 238-3, ¶ 9. Mr. Mikrut did not respond to ERO's many messages regarding facilitating
14 M.W.D.C.'s return. ECF No. 256-3, ¶¶ 5–7. ERO resorted to finding means of contacting
15 M.W.D.C. directly, but was unsuccessful. *Id.*, ¶¶ 8–9, 11. On February 18, 2020, after the Court
16 had entered its Contempt Order, Ms. Blumenau, Mr. Mikrut's colleague, finally contacted ERO
17 to coordinate the facilitation of M.W.D.C.'s return. *Id.*, ¶¶ 12–13. The delay in returning
18 M.W.D.C. was further attributable to the fact that it took about a week for Mr. Blumenau to
19 obtain and provide M.W.D.C.'s passport information to ERO. *Id.*, ¶¶ 15–17. The delay was
20 beyond ERO's control, since Guatemala requires M.W.D.C. to have a passport to leave the
21 country. *Id.*, ¶ 18.

22 Thus, Defendants, request to be relieved of the per diem coercive sanctions, since ICE
23 was unable to facilitate M.W.D.C.'s return by February 29 due to M.W.D.C.'s delay in providing
24 his passport. Defendants request that the Court relieve them of the coercive per diem sanctions
25 for the four days between March 1 and March 5, 2020 (*see* ECF No. 252, ¶ 7). Alternatively, the
26
27

1 Court should not charge Defendants for the approximately thirteen-day period of delay on the
2 part of M.W.D.C.'s attorney.

3
4 **II. THE COERCIVE SANCTIONS ARE PUNITIVE BECAUSE THEY ARE NOT
NEEDED TO OBTAIN DEFENDANTS' COMPLIANCE**

5 The \$500-per-day sanction was not and is not needed to obtain Defendants' compliance
6 with returning the removed individuals. *See Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510,
7 517 (9th Cir. 1992) ("Generally, the minimum sanction necessary to obtain compliance is to be
8 imposed"); *United States v. Flores*, 628 F.2d 521, 527 (9th Cir. 1980) ("[T]he Ninth Circuit has
9 held that a district court should apply the least coercive sanction (*e.g.*, a monetary penalty)
10 reasonably calculated to win compliance with its orders.") (Internal quotation marks omitted).

11 The Court should, therefore, relieve Defendants of the coercive per diem sanctions.
12 Indeed, before the Court entered its Contempt Order, Defendants voluntarily had agreed to
13 facilitate the returns of all five removed individuals, and had begun the process to do so.
14 Additionally, before the Court entered the Contempt Order, Defendants returned N.P.G. to the
15 United States. *See* ECF Nos. 248, 250, 251. Defendants also returned E.S.L.D.A. and M.W.D.C.
16 within a week of the Court's deadline. *See* ECF Nos. 258, 261. And, as documented *supra* and in
17 Defendants' updates (ECF Nos. 256, 266), Defendants continue their diligent efforts to return
18 R.M.N., who has expressed a desire to return to the U.S. and is waiting to obtain his passport
19 from his attorney, as quickly as possible.

20 If the goal of the civil contempt order was to effectuate the return of the removed
21 individuals as quickly as possible, then this has been largely accomplished regardless of the per
22 diem coercive fine. Accordingly, the Court should allow Defendants the opportunity to purge the
23 contempt without incurring the financial penalty. *See General Signal Corp. v. Donallco, Inc.*,
24 787 F.2d 1376, 1380 (9th Cir. 1986) ("in determining how large a coercive sanction should be
25 the court should consider the character and magnitude of the harm threatened by continued
26 contumacy, and the probable effectiveness of any suggested sanction.").

1 **III. ANY COERCIVE SANCTIONS MUST BE PAYABLE TO THE COURT.**

2 The Ninth Circuit case law makes clear that per diem coercive sanctions are payable to
3 the Court, not to Plaintiffs' counsel. *See Gen. Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376,
4 1380 (9th Cir. 1986) ("If the fine, or any portion of the fine, is coercive, it should be payable to
5 the court..."); *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1482 (9th Cir.
6 1992) (holding that the district court erred in making the contempt sanction payable to a party
7 rather than the court); *see also Arabian Gas & Oil Dev. Co. v. Wisdom Marines Lines, S.A.*, No.
8 16-CV-03801-DMR, 2017 WL 4390184, at *7 (N.D. Cal. Oct. 3, 2017) ("The court finds that a
9 fine of \$500.00 a day *payable to the court* is appropriate under the circumstances.") (Emphasis
10 added); *Reed v. Fed. Nat'l Mortg. Ass'n*, No. 5:13-CV-00940-VAP-SPX, 2019 WL 7166975, at
11 *3 (C.D. Cal. Dec. 4, 2019) ("The fine shall be payable to the Court.").

12 Making the fine payable to Plaintiffs' counsel renders the sanction punitive. *See Lasar v.*
13 *Ford Motor Co.*, 399 F.3d 1101, 1111 (9th Cir. 2005) ("We have held that a fine payable to an
14 opposing party was punitive because it was not designed to compensate [the opposing party] for
15 any actual or estimated harm.") (Internal citation and quotations omitted). That is because where
16 compensation is intended, such a fine must be based upon evidence of actual loss. *See United*
17 *States v. United Mine Workers*, 330 U.S. 258, 304 (1947).

18 Here, the Court already remedied any monetary injuries incurred in litigating the
19 removals when it ordered Defendants to pay attorneys' fees, as well as for the individuals' travel
20 costs. *See* ECF No. 252, ¶¶ 4, 6. That sanction is compensatory, especially since the Court
21 ordered Plaintiffs to provide evidence of actual loss by providing "detailed declarations or billing
22 records justifying a specific sanction amount..." *Id.* The per diem coercive sanctions here,
23 however, are not compensatory because it is not supported by any evidence of actual loss, and,
24 therefore, should not be payable to Plaintiffs' counsel. *See United Mine Workers*, 330 U.S. at
25 304.

1 Thus, to the extent the Court finds that the coercive sanction remains necessary, this
2 Court should modify its contempt order to make the sanction payable to the Court.

3 **CONCLUSION**

4 **For the above-stated reasons,** Defendants request the Court grant the motion for
5 reconsideration.

6
7 Dated: March 13, 2020

Respectfully submitted,

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